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No. 1164

IN THE

Supreme Court of the United States

JANUARY TERM, 1966

IN THE MATTER OF ALBERT SEVERINO,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Albert Severino, petitioner herein, prays that a writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the case of *In the Matter of the Petition for a Writ of Habeas Corpus of Albert Severino* on September 22, 1965, and denying a motion for rehearing on October 27, 1965, being Case Number 39470.

OPINIONS BELOW

The journal Entry of judgment of Conviction of the Court of Common Pleas of Franklin County, Ohio, is unreported and appears in the transcript of the record.

The opinion of the Court of Appeals of the 10th Judicial District of Ohio (Franklin County) is reported and appears herein as Appendix D.

The dismissal of the appeal by the Supreme Court of Ohio is unreported and is printed herein as Exhibit F.

The denial of the rehearing hereon by the Supreme Court of Ohio is unreported and is printed herein as Appendix G.

JURISDICTION

The judgment of the Supreme Court of Ohio denying rehearing was entered on October 27, 1965. The Jurisdiction of the Court is invoked under 28 USCA Section 1257 (3).

QUESTIONS OF LAW PRESENTED

1. UNDER THE CONSTITUTION OF THE UNITED STATES, AND THE STATUTES OF THE STATE OF OHIO PERTAINING TO EXTRADITION, DOES THE GOVERNOR OF OHIO HAVE THE AUTHORITY UNDER SECTION 2963.05 TO RETURN A CONVICT TO THE DEMANDING STATE FOR TRIAL AND SENTENCE, THEN BACK TO OHIO TO FINISH HIS SENTENCE, THEN BACK TO THE DEMANDING STATE FOR PUNISHMENT UNDER ONE AGREEMENT?
2. DID NEW YORK WAIVE JURISDICTION OVER PETITIONER BY NOT PROVIDING FOR HIS SUBSEQUENT RETURN UNDER THE AGREEMENT, AND FURTHER DID THE AGREEMENT BECOME MOOT BY PETITIONER'S FORMAL WAIVER EXECUTED SEPTEMBER 2, 1959?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Volume 18; Sections 3182, United States Code.
2. Pages Ohio Revised Code Volume 29, O.R.C. Sections 2963.01 et al.

STATEMENT OF THE CASE

In the year 1959 while the petitioner Albert Severino was serving a 5 year sentence in the Ohio Penitentiary, he was extradited to the State of New York by virtue of an

agreement entered into by and between the Governor of Ohio and the Governor of the State of New York pursuant to the provisions of Section 2963.05, Revised Code. The agreement provided he was to be returned to the state of Ohio after the prosecution in the State of New York had terminated.

Petitioner was taken to New York under the agreement, found guilty and sentenced, and said sentence reads as follows:

> Sentence September 21, 1959
> Defendant being indicted for the crimes of Burglary, Third Degree and Grand Larceny First Degree, upon his own confession and plea of guilty, after having been advised by the Court of his rights to trial by jury, which he waived, and after the Assistant District Attorney had moved imposition of sentence, the defendant was asked by the Clerk of Court if he had any legal cause to show why judgment should not be pronounced, to which he answered "NO", is this 28th day of September, 1959; sentenced to be imprisoned in the Attica State Prison, Attica, New York, at hard labor, for the term of not less than 5 years nor more than 10 years on the Grand Larceny first degree charge. Sentences to run concurrently. It is proved by satisfactory evidence to the Court that the prisoner is a welder by occupation, and is 36 years of age, and was born in Batanica, New York.

Petitioner was then returned to Ohio, where he finished his 5 year sentence. Upon release from the Ohio Penitentiary in 1964, the State of New York then attempted to have him returned the second time to New York under the agreement of 1959 to serve the sentence for which he was sentenced in 1959.

Petitioner filed a Petition for a Writ of Habeas Corpus, which Writ was denied by the Franklin County Common

Pleas Court, and affirmed by the Court of Appeals, Certiorari denied by the Supreme Court of Ohio.

Petitioner now appeals to this Court on a substantial constitutional question, and questions of law involving matters of great public and general interest.

REASONS FOR GRANTING THIS WRIT

The Supreme Court of the State of Ohio, by dismissing the appeal of this petitioner, has, upon execution of his sentence, deprived the petitioner of his liberty without due process of law.

ARGUMENT

1. UNDER THE CONSTITUTION OF THE UNITED STATES, AND THE STATUTES OF THE STATE OF OHIO PERTAINING TO EXTRADITION, DOES THE GOVERNOR OF OHIO HAVE THE AUTHORITY UNDER SECTION 2963.05 TO RETURN A CONVICT TO THE DEMANDING STATE FOR TRIAL AND SENTENCE, THEN BACK TO OHIO TO FINISH HIS SENTENCE, THEN BACK TO THE DEMANDING STATE FOR PUNISHMENT UNDER ONE AGREEMENT?

There is no dispute that the only authority of the Governors to enter into an agreement was derived from Section 2963.05 of the Ohio Revised Code.

The agreement states in its entirety.

> WHEREAS, application has been made to the Governor of the State of Ohio by the Governor of the State of New York for the issuance of a warrant of the Governor of the State of Ohio directed to any peace officer of said state for the arrest of ALBERT ANTHONY SEVERINO, also known as Alfred Depalma, described in the requisition for extradition of the Gov-

ernor of the State of New York to the Governor of the State of Ohio, dated June 13, 1958, and for the delivery of said ALBERT ANTHONY SEVERINO upon such arrest to the duly designated agents of the State of New York for return to Chautauqua County, State of New York, for trial upon a charge of burglary in the third degree and grand larceny in the first degree, pending in said County and State of New York, against such person; and

WHEREAS, the said ALBERT ANTHONY SEVERINO is now confined by the prison authorities of the State of Ohio under sentence duly imposed in such state;

NOW, THEREFORE, I, MICHAEL V. DiSALLE, as Governor of the State of Ohio do hereby agree with MALCOLM WILSON, as Acting and Lieutenant Governor of the State of New York, pursuant to Section 2963.05 of the Revised Code of Ohio, and Section 832 of the Code of Criminal Procedure of New York, and related statutes, to the extradition of said ALBERT ANTHONY SEVERINO to the State of New York before the conclusion of the term of sentence now being served by him in the State of Ohio, upon the express condition that said person be taken from and returned to the State of Ohio at the expense of the State of New York, to be so returned, as soon as the prosecution in the State of New York is terminated, to the custody of the officer, agent or person making the original surrender of the prisoner to the agents of the State of New York; and

I, MALCOLM WILSON, as Acting and Lieutenant Governor of the State of New York, do hereby covenant and agree with the aforesaid MICHAEL V. DiSALLE, as Governor of the State of Ohio, that the aforesaid express conditions upon which the application for the extradition of the said ALBERT ANTHONY SEVERINO to the State of New York is granted shall be in all respects fulfilled and complied with and are expressly accepted as the terms and con-

ditions of the said extradition; and that if the said ALBERT ANTHONY SEVERINO be surrendered to the State of New York as above provided, the State of New York shall pay and defray all the expenses of the taking from and subsequent return of the said ALBERT ANTHONY SEVERINO into the custody of the officer, agent or person surrendering the prisoner to the agents of the State of New York; and that such return shall be made as promptly and expeditiously as reasonably possible by and at the expense of the State of New York, as aforesaid.

Section 2963.05 of the Ohio Revised Code and Section 832 of the New York Criminal Code are identical.

This court has held in the case of *State ex rel Corbett*, 168 Ohio St. 468 that authority vested in the Governor under 2963.05 is an executive function, the use of which is discretionary with the Governor.

By the very nature of 2963.05, being discretionary, this means the Governors are not duty bound to demand the return of a fugitive.

The courts will not interfere with this discretion, *State ex rel Corbett* 168 Ohio St. 468. However, once the Governors have exercised this discretion, the courts are duty bound to see that this discretion is not exercised to the prejudice of the accused.

In reference to the facts of this case, the only agreement which could be legal under 2963.05 and 832 of the Code of Criminal Procedure would be as follows:

> "When it is desired to have returned to this State (*N. Y.*) a person charged in this State (*N. Y.*) with a crime and such person (*Severino*) is imprisoned or is held under criminal proceedings then pending against him in another State, (*Ohio*) the Governor (*N. Y. Governor*) may agree with the executive authority of such other State (*Ohio Governor*) for the extradition

> of such person (*Severino*) before the conclusion of such proceedings or his term of sentence in such other State (*Ohio*), upon condition that such person (*Severino*) be returned to such other State (*Ohio*) at the expense of this State (*N. Y.*) as soon as the prosecution in this State (*N. Y.*) is terminated."

The agreement in question very specifically covers this. The agreement was signed August 11, 1959. The Governors did not know on that date if Severino was going to plead guilty or request a jury trial, or what the disposition of the case would be. It was not until September 28, 1959, (48 days after the agreement was signed by the Governors) that Severino was sentenced in New York. The sentence reads as follows:

> Defendant being indicted for the crimes of Burglary Third Degree and Grand Larceny First Degree, upon his own confession and plea of guilty, after having been advised by the court of his rights to trial by jury, which he waived, and after the Assistant District Attorney had moved imposition of sentence, the defendant was asked by the Clerk of Court if he had any legal cause to show why judgment should not be pronounced, to which he answered "NO", is this 28th day of September, 1959; sentenced to be imprisoned in the Attica State Prison, Attica, New York at hard labor, for the term of not less than 5 years nor more than 10 years on the Burglary third degree charge and not less than 5 years nor more than 10 years on the Grand Larceny first degree charge. Sentences to run concurrently. It is proved by satisfactory evidence to the court that the prisoner is a welder by occupation, and is 38 years of age, and was born in Batanica, New York.

As set out above, the sentence does not mention any language about being suspended until Severino returns from the Ohio Penitentiary.

At this point, the prosecution is terminated and Severino was sent back to Ohio by New York at the expense of New York, all under the terms of the agreement. The agreement has been executed in every detail and there is nothing further to be done under the agreement, or, in fact, nothing further stated or spelled out in the agreement.

The Common Pleas Court, the Court of Appeals and even petitioner agree that this present extradition proceedings is based under Section 2963.05 which provides for an agreement between the Governors. 2963.05 also specifies under what conditions and for what purpose an agreement can be entered into.

A reading of 2963.05 would not permit an agreement to be entered into by the Governors whereby Severino could be taken from Ohio to N. Y., then back to Ohio, then back to N. Y. The Statute provides specifically for Ohio to release a person charged with crime to another state, and then the return by the other State to Ohio, nothing further.

Section 2963.05 is a criminal Statute, and it is a well-established rule, recognized by Statute R.C. 1.11 that penal laws must be strictly construed. This court has held that a Statute cannot be extend by construction to persons or *things* not within its descriptive terms though they appear to be within the reason and Spirit of the Statute. *State v. Meyers*, 56 OS 340; *Baker v. State*, 69 OS 68; *State v. Hearn*, 115 OS 340.

All doubts in the interpretation of a Statute are to be resolved in favor of the defendant. *State v. Meyers*, 56 OS 340.

Section R. C. 2963.02 provides for the arrest and delivery to the executive authority of any other State of the United States of any person who has fled from justice. This Statute says the Governor shall have arrested and delivered, etc. This Section R. C. 2963.02 is mandatory on the governor and not discretionary *Work v. Corrington*, 34 OS 64.

This Section provides for the return of a fugitive who has come to Ohio to avoid prosecution or punishment and who is not incarcerated at the present time by Ohio, but is freely enjoying his liberty.

Sections R. C. 2963.05 provides for the return of a person presently imprisoned or held under criminal proceedings pending against him. This Section says the Governor *may* agree, this Section gives the Governor the discretion to return a person and is not mandatory.

As above stated, the Requisition of the State of New York is based upon the agreement available under R. C. 2963.05. The agreement itself uses the code number 2963.05 and states the Governors are acting pursuant to R. C. 2963.05.

When Severino was released from the Ohio Penitentiary on February 13, 1964 he was released from Ohio authorities, Ohio no longer had any legal right to detain him. The Governor had no discretion to return him. Section R. C. 2963.05 was not involved. The agreement could not, and did not cover this, because R. C. 2963.05 does not provide for a situation to return a person no longer imprisoned or held under criminal proceedings, which was on February 13, 1964, and still is, the status of Albert Severino.

If New York had, or has, any rights at all to have Severino extradited, it could only be under R. C. 2963.02.

The whole subject of extradition between the various states is governed and regulated by positive law, *Ex parte Shelden*, 34 OS 319.

Severino's extradition is a matter which is controlled by the United States Constitution and is not dependent upon comity or contract, *People ex rel Corkrand v. Hyatt*, 64 N. C. 825.

The opinion No. 7791 rendered by the Court of Appeals of Franklin County, Ohio, page three paragraph two states.

> "*On August 11, 1959,* the Governors of Ohio and New York, acting pursuant to the provisions of the Uniform Extradition Law (Chapter 2963, Revised Code of Ohio) (Section 832, New York Code of Criminal Procedure) signed a compact agreeing to the extradition of Severino from Ohio to New York before the conclusion of the Ohio sentence, then being served, upon condition that New York would return Severino "As soon as the prosecution in the State of New York is terminated."

It is quite apparent from the date of this agreement (August 11, 1959) that no intention can be inferred to have Severino returned to New York on February 13, 1964 because not knowing the outcome of Severino's two charges in New York they could not agree to something which was not in existence. Their agreement covered everything contemplated between the parties and it was fully executed prior to February 13, 1964. It being fully executed, there is no authority at this time to compel his return to New York.

ARGUMENT

2. DID NEW YORK WAIVE JURISDICTION OVER PETITIONER BY NOT PROVIDING FOR HIS SUBSEQUENT RETURN UNDER THE AGREEMENT, AND FURTHER DID THE AGREEMENT BECOME MOOT BY PETITIONER'S FORMAL WAIVER EXECUTED SEPTEMBER 2, 1959?

The Trial Court erred in failing to find that New York waived jurisdiction over petitioner by voluntarily returning him to Ohio without making an agreement for his return to New York.

Judge Reynolds of the Common Pleas Court stated in his decision, Case Number 219,461 page two the last paragraph.

> "The facts (Brunner v. Domini) in that case are materially different from the facts in the instant case. Here (Severino) we have an agreement between New York and Ohio whereby the petitioner was released by Ohio for the purpose of Prosecution in New York and then to be returned to Ohio to complete his sentence."

Judge Reynolds said *Brunner* was not applicable because of the absence of an agreement in *Brunner*. All of the reasoning set out in Assignment of Errors Number One are applicable here. It would be impossible to have an agreement to cover what was to be done with Severino, because they had no way of knowing the disposition of his case. Under this situation then, the *Brunner* case would be applicable, *People ex rel Brunner v. Domini*, 191 N.Y.S. 2d 46.

In the *Brunner* case, petitioner was subject to a Florida judgment rendered on petitioner's plea of guilty to a charge of breaking and entering and grand larceny which provided

that the passing of sentence would be suspended from day to day and term to term until further order of the Court and petitioner was released to the custody of New York authorities and was brought by them to New York to answer criminal charges and was released on probation under a suspended sentence. Florida then demanded petitioner's extradition as a fugitive from justice. The New York Supreme Court in a habeas corpus action sustained the writ and discharged the prisoner holding that "the petitioner was not a fugitive from justice and request from Florida for his return should have been made pursuant to the provisions of the statute relating to persons who had left the demanding state under compulsion, and the only method which could be employed to return petitioner to Florida was by way of agreement between the governors of the two states.

The Court further says in the *Brunner* Case:

> "It is obvious that the method here employed to deliver the relator to the New York authorities and secure his return was not one authorized by the Uniform Criminal Extradition Act. The Florida Court was not obliged to surrender the relator. It should have exhausted its remedies against him before recognizing the New York claim. *Ponzi v. Fessenden*, 258 U.S. 264, 42 S. Ct. 309 66 L. Ed. 607."

Also, the *Brunner* case was a situation where petitioner was extradited from Florida to New York, and then later Florida tried to get him back through extradition from New York. The court sustained the writ and discharged the petition on the basis that there was no agreement.

If the court should find a valid agreement in Severino, the situation would be as follows: New York extradites Severino from Ohio, by virtue of an agreement, the agree-

ment provides how Ohio is to get him back after he goes to New York. When New York returned him to Ohio, no agreement was entered into for his second return to New York.

Nowhere in this agreement is it stated that Albert Severino was to be returned to New York after he has finished serving his time in the State of Ohio. This is the waiver which the petitioner claims took effect when New York returned him to the State of Ohio before he served his sentence in the State of New York. This agreement provides one thing, that Albert Severino be taken to New York and when they are finished with their prosecution he be returned to Ohio. That was done and there is no further agreement whereby he can now be returned to New York.

Petitioner refers this court to page three of the opinion rendered by the Court of Appeals (No. 7791) the last paragraph reads it further appears:

> "L. That on September 2, 1959 said fugitive, Albert Anthony Severino, voluntarily agreed to return to New York State for the purpose of prosecution as more fully appears in a waiver signed by said Albert Anthony Severino on the 2nd day of September, 1959 at the City of Marion, State of Ohio, a copy of which is attached hereto and made a part of this application and marked Exhibit I."

It is undisputed that petitioner signed the waiver above referred to.

This waiver then made the agreement of the Governors moot, and petitioner was taken back by New York, and could have been tried, sentenced and punished before being returned to Ohio.

This again created a situation for the *Brunner* case to be applied.

In the *Brunner* case the court said.

> "It is obvious that the method here employed to deliver the relator to the New York authorities and secure his return was not one authorized by the Uniform Criminal Extradition Act. The Florida Court was not obligated to surrender the relator, it could have exhausted its remedies against him before recognizing the New York claim. *Ponsi v. Fessenden,* 258 U.S. 264, 42 S. Ct. 309, 66 L. Ed. 607.

The governor of Ohio has other authority under R.C. 2963.17.

> "If a criminal prosecution has been instituted under the laws of this state against a person sought by another state under Sections 2963.01 to 2963.27, inclusive, of the Revised Code, and is still pending, the governor *may* surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this State."

This Section of the Revised Code has been passed on by the Court of Common Pleas of Summit County in the case of *Ex parte Bell* 75 NE 24 186 the court held

> "Under statute authorizing Governor in his discretion to surrender a person on demand of the executive authority of another state or hold him until trial, conviction and punishment in Ohio if a criminal prosecution has been instituted against such person under the laws of Ohio and is 'still pending', the quoted words mean before the accused has been *tried, convicted, and punished* (our emphasis)

Under this rule, when the Governors entered into their agreement, there was nothing pending because Severino had been tried, convicted and sentenced in Ohio. The Governor of Ohio cannot transgress the jurisdiction of the judiciary without specific statutory authority, which in this instance he does not have.

If this interpretation be correct, then this returns us to R.C. 2963.05, the *Brunner* case, which is a New York case, decided the exact same section of the Criminal Procedure of New York Section 832.

New York has made no provisions for the return of Severino and New York in the *Brunner* case has previously decided that this provision is a necessary element to preclude a waiver taking place. *In Re Acton* 103 NE 2d 577 Syllabus two.

> "The sufficiency of an affidavit accompanying a requisition upon the Governor of Ohio for extradition of a person charged with the commission of an offense in the demanding state is to be *tested by the laws of the demanding state.*

Clearly Ohio did not intend for petitioner to be free and remain at large in New York after the proceedings in New York were disposed of. This is certainly the reason why Section R.C. 2963.05 was enacted.

Petitioner was sentenced by the trial judge in New York. That sentence could only be set aside or suspended by judicial authority or by a pardon of the Governor. New York waived their jurisdiction over the petitioner by returning him to Ohio while a sentence was still pending against him in the State of New York. The trial judge could have deferred sentence until petitioner had returned to Ohio and completed his sentence, this he did not do.

Ohio protected the right to have petitioner returned thru the agreement, New York did not. *People ex rel Barrett vs. Bratley* 383 Illinois 437, 50 N.E. 2d 517, 147 ALR. 935.

> "A state which honors the request of another state for the extradition of a convict serving a prison sentence without stipulating for his return, thereby relinquishes jurisdiction to subject him to further punishment."

OPINION OF GOVERNORS COUNCIL — 89 NE 174

Ex Parte Youstler, 268 p. 323

Where a person is convicted in this State for a felony and appeals from such conviction, and pending such appeal is released by supersedeas, and while at liberty is delivered by the Governor of this State to a sister State by extradition proceedings, such delivery is a waiver of the jurisdiction of this State over the person and a waiver of the right of the State to demand the return of such person thereafter as a fugitive from Justice. The honoring of the requisition does not satisfy the judgment, and if thereafter such convicted person is acquired, he may be required to satisfy the judgment of conviction of this State.

State ex rel Falconer v. E. Bernstein, 105 Neb. 833, 182 NW 500

Where a person is charged in two states with the commission of a separate offense in each, and has been arrested in one of them, such state has exclusive jurisdiction of the alleged offender until the demands of its laws are satisfied. Nevertheless the Governor of such state may honor the requisition of the Governor of a demanding state and such surrender of the prisoner will operate as a waiver of the jurisdiction of the asylum state.

With respect to waiver the following cases are presented:

Werntz v. Looney, 208 F 2d 102

A prisoner in the State Penitentiary could be turned over to Federal authorities for a trial in Federal Court on Federal charge, and Federal Court had power to sentence such person and to provide that sentence be served concurrently or consecutively with sentence imposed by State Court.

People v. Klinger, 319 Ill. 274, 149 NE 799

If at the time such requisition is made the fugitive is in the custody of the Courts of the asylum state under a charge of offense against its laws, the Governor thereof is not required to surrender such fugitive until after the judgment of the Court of that state is satisfied. The Executive of the asylum state may, however, relinquish the prisoner by waiving jurisdiction, even though such fugitive is under the jurisdiction of the Courts of such asylum state.

Robert v. Reilly, 116 U.S. 80, 6 S. Ct. 291, 29 L Ed 544

Where the requisition has been honored and the fugitive surrendered thereunder, such surrender will operate as a waiver of jurisdiction of the asylum State. *United States vs. Morrin,* (B. C.) 277 F. 319, *State vs. Ebestein,* 105 Neb. 833.

People ex rel Gallagher v. Hogan, 69 NYS 475

It is no defense to a warrant of extradition that the prisoner has been convicted of a crime in the State, but has been mailed during his appeal, and that he cannot be extradited until he has served his sentence, or until he has been finally acquitted, as the Governor of the state may waive the right of the state to punish the prisoner for a crime committed in the state.

Hess, et al. v. Grimes, 48 Pacific 596

Where a person is charged with the commission of an offense against two separate states or territories, and is apprehended in one of them, and the laws of such state or territory have been put in force against him, it has exclusive jurisdiction of the prisoner until the demands of its

laws are satisfied. If, however, the Governor of such state honors a requisition for the prisoner made upon him by the Governor of the other state, and surrenders him to the demanding state, it will operate as a waiver of the jurisdiction of the asylum state.

United States vs. Hayman, 1952-1954, 72 S. Ct. 263, 342 U.S. 205, decided January 7, 1952, recalled and affirmed August 15, 1954.

When a Respondent claims Co-Jurisdiction:

The Supreme Court, under the voice of Justice Clark, stated:

> "There is no Authority that may misconstrue the part of the Constitution or the text therein. The part of which I speak concerns the article or paragraph that denounces a jeopardizing act. This body has decided the act or acts of conflicting Jurisdictions are unauthorized and are not Constitutional. Therefore, *the supplement action of this body is definite as approved by the majority.*"
>
> "The Supplementary general states the law Corpus Jurisdiction 25 when a person has been approved to be delivered up to a sovereign custody to satisfy he or she being a ward of the sovereign becomes their Jurisdiction until it is exhausted. This is the case of a person being a parole violator, or such other cases whereas to satisfy apart, or the remainder of his or her sentence, the Sovereign has first Jurisdiction can be had upon a person at one time. One is satisfied and waives its right thereto. Neither can a person legally do a part of his or her sentence and answer claim to do part of a later date if he is confined to another jurisdiction in between."

Prisoners will not be allowed to do their time on the installment plan. This became a Supreme Court law on Sept. 24, 1960.

In 1928 the case of *Ex Parte Guy,* 269 Pac 782 held: "Gov-

ernors action in surrendering convict undergoing sentence to Federal Authorities in effect Pardon of remainder of State Judgment".

In March 1962, the Court of Appeals of Kentucky held in *Davis v. Harris Ky.* 355 SW 2d 147, "Statute authorizing Governor to surrender upon demand of Execution authority of another State any person found in Kentucky, not withstanding that fact that Criminal prosecution or charges under Ky. laws might be pending against such person would be given liberal and practical construction." KRS 330 Ibid.

CONCLUSION

The Constitutional and statutory rights of the petitioner were denied by the Court of Common Pleas, Franklin County, Ohio, and also by the Court of Appeals of Franklin County, Ohio and the Supreme Court of Ohio, and this case should be reviewed by this Court so that the substantial constitutional questions and the questions of public and great general interest can be determined.

Respectfully submitted,

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APPENDIX A
COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 219,461

IN THE MATTER OF THE PETITION FOR WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

DECISION

Rendered this .. day of July, 1964.

REYNOLDS, J.

The State of New York seeks to extradite applicant from the State of Ohio to the State of New York for sentence in a case in which he has been found guilty.

The facts are that, while Severino was serving a term in the Ohio Penitentiary, he was wanted in New York for a crime committed in that state.

By an agreement between the two states, he was returned to New York for the purpose of prosecution, the agreement provinding that New York was to bear the expense of taking him to New York and returning him to Ohio for the purpose of completing his sentence in Ohio, after completion of the prosecution in New York.

He was tried in New York and found guilty and thereupon, pursuant to the above agreement, he has returned to Ohio and completed his sentence in the Ohio Penitentiary.

Thereupon the State of New York sought to return him to that state for the purpose of sentence and proceeded by extradition so to do.

This writ of Habeas Corpus was then filed, and pending the decision therein, applicant was released on bond.

The basis of the writ is that the State of New York lost jurisdiction when it returned the applicant to Ohio before he was sentenced and reliance is had on the case of *Brunner vs. Dominy,* 191 New York Supplement, 2nd Series, 46.

In that case Brunner had entered a plea of guilty to breaking and entering in the State of Florida and sentence was deferred until further order of court.

Thereafter, the State of New York brought extradition proceedings and he was released by the State of Florida, taken to New York and after conviction, was placed on probation in that state.

Thereupon Florida sought by means of extradition proceedings to return Brunner to that state for sentence in the Florida case.

The Court, on releasing Brunner on a writ of habeas corpus, held that where the prisoner was released to the custody of New York authorities and brought to New York to answer criminal charges and was released on probation under a suspended sentence, petitioner was not a fugitive from justice and request from Florida for his return should have been made pursuant to provisions of statute relating to persons who have left the demanding state under compulsion and the only method which could be employed to return the petitioner to Florida was by way of agreement between the Governors of the two states.

The facts in that case are materially different from the facts in the instant case. Here we have an agreement between New York and Ohio whereby the petitioner was released by Ohio for the purpose of prosecution in New York and then to be returned to Ohio to complete his sentence.

There was no release of jurisdiction by New York and that state did the only thing it could do under its agreement with Ohio, and its jurisdiction over petitioner was continued until such time as he could be returned for sentence.

In the *Brunner* case the State of Florida voluntarily surrendered the prisoner with no conditions attached and that was the reason that the Court held that Florida had lost jurisdiction.

The agreement between the State of New York and Ohio reads as follows:

> "NOW, THEREFORE, I, MICHAEL V. DISALLE, as Governor of the State of Ohio do hereby agree with MALCOLM WILSON, as Acting and Lieutenant Governor of the State of New York, pursuant to Section 2963.05 of the Revised Code of Ohio, and Section 832 of the Code of Criminal Procedure of New York, and related statutes, to the extradition of said ALBERT ANTHONY SEVERINO to the State of New York before the conclusion of the term of sentence now being served by him in the State of Ohio, upon the express condition that said person be taken from and returned to the State of Ohio at the expense of the State of New York, to be so returned, as soon as the prosecution in the State of New York is terminated, to the custody of the officer, agent or person making the original surrender of the prisoner to the agents of the State of New York; and * * *"

The Court has heretofore held that the term "prosecution" as used in said agreement, referred only to the trial on the criminal charge and did not contemplate the serving of sentence in case of a conviction.

This is not only in accordance with the ordinary meaning of the word "prosecution" but it is also manifestly in accordance with the understanding of the contracting parties as demonstrated by their conduct in returning Severino to

Ohio promptly after his conviction and before sentence.

Under the circumstances, Severino's status is presently the same as it was at the time of the first extradition proceedings. Under Section 3182 U.S. Code of Criminal Procedure, numerous authorities are cited to show that where one has committed a crime in one state and is later found in another state, he is a fugitive from justice irrespective of whether his absence from the demanding state was voluntary or involuntary.

The Court concludes that Severino is under the statute a fugitive from justice and amenable to extradition proceedings.

The writ is therefore denied.

/s/ DANA F. REYNOLDS,
Judge.

Copies to:

APPENDIX B
COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 219,461

IN THE MATTER OF THE PETITION FOR WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

ENTRY

This day this cause came on to be heard upon the Petitioner's Application for a Writ of Habeas Corpus. The Court, after careful consideration of the Briefs and oral arguments on behalf of the Petitioner, finds said Petition to be not well taken.

Wherefore, Petition filed herein for a Writ of Habeas Corpus is denied.

/s/ DANA F. REYNOLDS,
Judge.

Approved:

.....
Prosecuting Attorney

.....
Assistant Prosecuting Attorney
Attorneys for Relator.

.....

.....
Attorneys for Petitioner.

APPENDIX C
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7791

IN THE MATTER OF THE PETITION FOR WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

ENTRY

This day this cause came on to be heard upon the assignments of error, the briefs and oral arguments of the parties. The Court, after due and careful consideration, finds that the said assignments of error are not well taken and must be overruled.

Wherefore, the assignments of error are hereby overruled and the judgment of the Court below is affirmed and the cause is remanded.

Exceptions to the defendant.

.....

.....

.....

Judges.

Approved:
/s/ JAMES C. BRITT
/s/ JOSEPH H. HANS
Attorneys for Petitioner.
/s/ C. HOWARD JOHNSON
Prosecuting Attorney
/s/ FRED L. NEWSOM, JR.
Assistant

APPENDIX D
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7791

IN THE MATTER OF THE PETITION FOR WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

OPINION

Rendered on February 16, 1965.

Mr. James C. Britt and Mr. Joseph H. Hans, 297 South High Street, Columbus, Ohio, For Petitioner.

Mr. C. Howard Johnson, Prosecuting Attorney, Mr. Fred L. Newsom, Jr., Assistant, Franklin County Court House, Columbus, Ohio, For Respondent.

Where a defendant has been lawfully sentenced to imprisonment in Ohio upon his conviction of violating Ohio criminal laws, and, before he has finished serving the Ohio sentence, is returned to another state pursuant to an agreement entered into by the Governor of Ohio and the Governor of the other state pursuant to the provisions of Section 2963.05, Revised Code, and, pursuant to which agreement, the prisoner is delivered to the other state where he is duly convicted and sentenced for violating the criminal laws of such other state and then is returned to Ohio to complete serving his Ohio sentence; extradition proceedings begun by the Governor of the other state at the time the prisoner has completed his Ohio sentence and the warrant of the Governor of Ohio ordering his return are not in-

valid, and the other state has not lost its right to the return of the prisoner under such circumstances.

Appeal: Court of Appeals for Franklin County.

Bryant, P. J.

Albert Severino has appealed on questions of law from the judgment of the court below denying his petition for writ of habeas corpus. On February 10, 1964, the Governor of Ohio issued his warrant to the Sheriff of Franklin County for the arrest of Severino and his surrender to an agent of the state of New York. This was pursuant to the demand by the state of New York for the extradition of Severino to serve two concurrent 5- to 10-year sentences in a New York prison imposed following Severino's conviction of burglary, third degree, and grand larceny, first degree.

Briefly, the facts are that Severino, prior to July 10, 1958, was serving an Ohio prison sentence imposed by an Ohio court for an offense committed in Ohio. Approximately six years remained to be served. In June 1958, a New York grand jury returned an indictment in two counts against the second charging grand larceny, first degree, alleged Severino, the first charging burglary, third degree, and to have taken place in Chautauqua County, New York, on April 27, 1958.

On June 13, 1958, the state of New York made demand on the Governor of Ohio for the extradition of Severino, and on June 20, 1958, the demand was honored and the Ohio Governor's warrant was issued. On July 10, 1958, Severino was arrested on this warrant and immediately filed his petition for release by habeas corpus attacking the sufficiency of the Ohio Governor's warrant. Both the Cuyahoga County Common Pleas Court and the Eighth

Appellate District Court of Appeals, the latter by judgment on May 20, 1959, upheld the warrant and denied relief by habeas corpus.

On August 11, 1959, the Governors of Ohio and New York, acting pursuant to the provisions of the Uniform Extradition Law (Chapter 2963., Revised Code of Ohio) (Section 832, New York Code of Criminal Procedure) signed a compact agreeing to the extradition of Severino from Ohio to New York before the conclusion of the Ohio sentence, then being served, upon condition that New York would return Severino "as soon as the prosecution in the state of New York is terminated."

It further appears:

> "L. That on September 2, 1959, said fugitive, Albert Anthony Severino, voluntarily agreed to return to New York state for the purpose of prosecution as more fully appears in a waiver signed by said Albert Anthony Severino on the 2nd day of September, 1959 at the city of Marion, state of Ohio, a copy of which is attached hereto and made a part of this application and marked 'Exhibit I.' "

Upon his return to Chautauqua County, New York, Severino appeared in court with two attorneys, first on September 8, 1959, when no action was taken; again on September 14, 1959, when he pleaded not guilty and the case was put on the trial list; again on September 21, 1959, when Severino, with counsel present and after admonition by the court, withdrew his not guilty plea and pleaded guilty; and finally on September 28, 1959, when he was given a 5- to 10-year sentence on the burglary charge, third degree, and a like sentence on the grand larceny charge, first degree, the sentences to be served concurrently.

Thereafter, Severino was returned to Ohio to complete

his term of imprisonment here. On December 23, 1963, Ohio prison officials notified the New York officials that Severino would be released on February 13, 1964. On January 30, 1964, the Governor of New York again issued extradition papers to the Governor of Ohio seeking the return of Severino to serve the two sentences imposed in New York in 1959.

On February 10, 1964, Governor James A. Rhodes of Ohio honored the extradition demand of New York and issued his warrant to Sheriff Stacy Hall of Franklin County, Ohio, who arrested Severino and placed him in the Franklin County jail in preparation for delivering Severino to the agent of the state of New York.

On February 13, 1964, Severino filed a petition in the Franklin County Common Pleas Court asking for release by writ of habeas corpus claiming his arrest and threatened return to New York was illegal and that New York, by returning Severino to Ohio after his New York sentence in 1959, lost all right to his return.

The court below overruled all objections interposed on behalf of Severino, approved the warrant issued by Governor Rhodes and denied Severino's prayer for release by habeas corpus. It is from that ruling that Severino has appealed to this court.

Counsel for Severino place considerable reliance upon a decision by the Supreme Court of Illinois in *People, ex rel. Barrett, Atty. Genl., v. Bartley, Judge* (1943), 383 Ill. 437, 50 N.E. 2d 517, 147 A. L. R. 935. It is true that in *Bartley* a prisoner was released from an Illinois prison, but a close examination of the decision indicates that the court felt the earlier action by which the prisoner, one McLaughlin, was released had the effect of a pardon.

There are several reasons why we are unable to follow the reasoning in *Bartley*. In 1943, when *Bartley* was decided, Illinois had not adopted the Uniform Extradition Law, and Illinois did not adopt it until 1955. Further, in *Bartley* the prisoner, McLaughlin, was released without conditions which are found in the Ohio-New York agreement.

More important, the holding in *Bartley* has been expressly considered by the Supreme Court of Ohio, has been labeled by it as the minority view, and was expressly rejected by the Supreme Court of Ohio in a per curiam opinion in *Heston v. Green, Supt.* (1963), 174 Ohio St. 291. In the course of the opinion, at pages 292-293, the court held as follows:

> "Petitioner cites and relies on a line of cases which hold that, where a convict is in custody under a conviction of a crime, the surrender of him to another sovereign for prosecution or imprisonment operates to preclude further punishment for the original conviction. See *People, ex rel. Barrett, Atty. Genl., v. Bartley, Judge,* 383 Ill. 437, and annotation, 147 A.L.R. 941. This, however, is the minority view. An examination of those cases shows no sound basis at law or under the Constitution to conclude that a release of a convict by one sovereign for prosecution for another crime or to serve a sentence for which crime the prisoner has already been convicted by another sovereign should constitute a waiver by the releasing sovereign of its rights to exact the full penalty.
>
> "Inasmuch as it is impossible for a person to be in two places at the same time, where one owes penalties to two separate sovereigns one sovereign must relinquish its claim and allow the other to exact its penalty first. Such relinquishment does not constitute a waiver of punishment but rather a mere delay in its execution. The order of punishment is a matter to be decided be-

tween the sovereigns and is a matter over which the convict has no control.

"This court had a similar question before it in *Guerrieri v. Maxwell, Warden,* 174 Ohio St. 40. The court in that case said:

" 'Therefore, where one has placed himself in the position of being wanted at the same time by two different sovereigns for the violation of penal statutes of both, it is a matter for the sovereigns to determine which shall first exact punishment from the offender, and not the offender. Under such circumstances it is the interested sovereigns who make the determination and the offender cannot complain of the order of his trials or punishment for such offenses. * * *

" '* * * The release by the state of one in its custody or under sentence by it to the federal government to serve a subsequently imposed federal sentence does not constitute a waiver by the state to carry into execution its previously imposed sentence after the termination of the federal sentence.'

"The same underlying principles which applied in the *Guerrieri* case are applicable here. The petitioner owed a debt to two sovereigns, each of which had an absolute right to require full satisfaction, and such penalty must be paid."

In light of the foregoing, the errors claimed on behalf of Severino, that New York waived its right to extradite him by returning him to Ohio in 1959, that the court below erred in holding that New York had a right to extradite Severino, and that the court below erred in construing the intent of the parties to the Governors' agreement, are not well taken and must be overruled.

For the reasons above set forth, both errors assigned are overruled, the judgment of the court below affirmed and the cause remanded.

Judgment affirmed.

DUFFY and TROOP, JJ., concur.

APPENDIX E
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7791

IN THE MATTER OF THE PETITION FOR WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

NOTICE OF APPEAL

Now comes Albert Severino and gives Notice of Appeal on substantial constitutional questions and questions of law to the Supreme Court of Ohio from the judgment and final order of the Court of Appeals of Franklin County, entered on the 19th day of March, 1965, as follows:

ENTRY

"This day this cause came on to be heard upon the assignments of error, the briefs and oral arguments of the parties. The Court, after due and careful consideration, finds that the said assignments of error are not well taken and must be overruled.

"Wherefore, the assignments of error are hereby overruled and the judgment of the Court below is affirmed and the cause is remanded.

"Exceptions to the defendant."

This action in Habeas Corpus did not originate in the Court of Appeals but was commenced in the Court of Common Pleas of Franklin County, Ohio.

JAMES C. BRITT
JOSEPH H. HANS
207 South High Street
Columbus 15, Ohio
Attorneys for Albert Severino.

Copy of the foregoing Notice of Appeal was served upon the Prosecuting Attorney of Franklin County, Franklin County Court House, Columbus, Ohio, on this ... day of March, 1965.

EXHIBIT 1

THE SUPREME COURT OF THE STATE OF OHIO

1965 Term

No. 39470

THE STATE OF OHIO,)
)
City of Columbus.)

To wit: Wednesday, September 22, 1965

IN RE: PETITION FOR A WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by Joseph H. Hans.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of .....19...
..... Clerk
..... Deputy

EXHIBIT F

THE SUPREME COURT OF THE STATE OF OHIO

1965 Term

No. 39470

THE STATE OF OHIO,)
)
City of Columbus.)

To wit: Wednesday, September 22, 1965

IN RE: PETITION FOR A WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for reason that no debatable constitutional questions exists herein.

It is further ordered that the ..... appellee... recover from the ..... appellant.... ..... costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of .....19...
..... Clerk
..... Deputy

EXHIBIT G

THE SUPREME COURT OF THE STATE OF OHIO

1965 Term

No. 39470

THE STATE OF OHIO,)
)
City of Columbus.)

To wit: Wednesday, October 27, 1965.

IN THE MATTER OF THE PETITION FOR WRIT OF HABEAS CORPUS OF ALBERT SEVERINO.

REHEARING

It is ordered by the court that rehearing in this case is denied.

It is further ordered by the Court that issuance of the mandate and entry in this case be, and the same hereby is, stayed for a period of twenty (20) days from this date to enable counsel for appellant to apply to the Supreme Court of the United States for an indefinite stay of execution during the pendancy of the appeal in that Court.

/s/ KINGSLEY TAFT,
Chief Justice.

I Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 47 Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 27th day of October, 1965.

THOMAS L. STARTZMAN, *Clerk.*
By /s/ NORMAN P. MEYERS, *Deputy.*